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Criminal justice, human rights and COVID-19 - a comparative study of measures taken in five African countries

Kenya, Malawi, Mozambique, South Africa and
Zambia

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Introduction

Lukas Muntingh

The spread of COVID-19 and the subsequent state responses to the virus have had significant consequences for citizens in southern and east Africa where ACJR is active. The declaration of and enforcement of a lockdown, in various shapes and forms, was the result of the World Health Organisation (WHO) declaring COVID-19 a global pandemic. It was soon evident that states opted for different responses and that there were subsequently different reactions from civil society. The limits placed on civil and political liberties in an effort to address COVID-19 seems to have facilitated violent and coercive responses from operational-level law enforcement functionaries. Importantly, in some states (e.g., South Africa) the defence force assisted in enforcing the lockdown. There were generally restrictions placed on criminal justice systems, placing them in holding patterns for longer or shorter periods of time. Apart from civil and political rights, the lockdowns also impacted on socio-economic rights. With large portions of the populations of these states living in poverty, they are dependent on the informal economy for their livelihood. With the formal economy placed on partial hold, this had dire consequences for the poor and those living in poverty. To this must be added that the living conditions of the poor in southern Africa cities often make self-isolation and social distancing impossible. Furthermore, one cannot ignore concerns that some authoritarian governments in Africa may use the pandemic and the fear that surrounds it as a cover for instituting tighter control over the media and civil liberties in order to tighten their grip on power. This brings into question the use of armed police and the military to enforce a public health intervention. Democratic policing would see the police as partners in public education, rather than as enforcers of overbroad restrictions. There is a need for analysis, elucidation and promotion of the proper role of law enforcement and criminal justice in such crises, particularly in the developing world, where it is often the hubris of the state to pretend that with lockdowns it is managing the load on the public health system.

It is the case that the COVID-19 lock-downs present a unique opportunity to investigate and analyse criminal justice systems and their performance under unusual circumstances that is not a state of war or large-scale political instability. It is because the right to liberty is fundamentally affected by a lock-down that it requires closer scrutiny on how states implemented it. Lock-downs also result in the widespread criminalising of behaviour that is otherwise not a crime and this has significant

implications for our understanding of crime, but also begs the question whether criminalisation (and arrest) is really an appropriate response to a public health crisis. A crisis is also an opportunity to consider options that have hitherto been considered unpalatable or not unacceptable. As much as scholars and lawyers may debate legal powers during abnormal situations, the real opportunity to study them do not often come around. What is frequently lacking is the 'sociological imagination'¹ to understand how the individual's existence is situated in these high-level and large-scale changes and, fundamentally, whether the value we place on individual rights is still respected. A lock-down by its very nature has an exclusionary purpose and result, and thus weakens the right to individual liberty ostensibly to protect the larger group, while at the same time granting the state more power to control the population. But limiting the right to liberty in this manner, may indeed be letting the proverbial genie out of the bottle and once out, the genie is often not too enthusiastic to return to the bottle of its own accord.

A crisis situation is also, unfortunately, fertile ground for 'ad hocery' where laws and policies are developed uninformed of a larger picture and undirected by strategy.² There is thus, first, a need to describe what happened under lock-downs and how this was enabled by legislation and its enforcement. Using a typology, it may be assessed what were good laws that were properly enforced as opposed to poor laws being badly enforced, or good laws being misused and so forth. Secondly, and following from the first, it is necessary to identify problems and lessons to be learnt to strengthen institutions of state designed to protect democracy as well as the criminal justice system in general. Oversight mechanisms (e.g., National Preventive Mechanisms - NPM and National Human Rights Institutions - NHRI) are specifically mandated to protect rights and certainly the right to liberty. It is similarly the case that the judiciary has a key role to play in protecting the right to liberty. Preliminary evidence indicates that oversight structures have crawled back into their shells (e.g., South Africa and Mozambique) at a time when their visibility and engagement were really needed.

From a governance and rights perspective, it is important to understand how rights are limited as well as what the impacts of such limitations are, and what measures have been taken, or not, to limit abuses of power in future. It is important to note that ACJR will continue its focus on the campaign against the criminalisation of poverty and status (www.pettyoffences.org) and that COVID-19 brought a change in context, but that much of the underlying theory of the campaign underpins the response

¹ Mills, *The Sociological Imagination*.

² Boin and T'Hart, 'Institutional Crises and Reforms in Policy Sectors.'

to COVID-19 and advancing human rights in a criminal justice context. This compendium covers five country reports which are the appendices (See Appendix 1-5). The five country reports were used as the basis to investigate the issues further. This was done by describing the process by which a State of Emergency (SoE) or State of Disaster (SoD), as the case may be, were declared with particular reference to stakeholder consultation with the judiciary, legislatures, civil society, academic community and broader public. The second focus was to analyse the legal frameworks of the five countries utilised to enforce SoE and SoD with a view to identify strengths and weaknesses in design. From these, four cross cutting issues are reported on in the four comparative chapters, being:

- surveying the measures taken to respond to COVID-19;
- litigation and responses to lockdown measures;
- the impact on civil and political rights, and
- the impact on detention monitoring and oversight mechanisms.

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Overview of COVID-19 measures taken

Janelle Mangwanda

1. Introduction

The COVID-19 pandemic adversely impacted the world-over and governments, including those in Africa, responded by imposing various degrees of restrictions to curb the spread of the virus and save lives. This report provides an overview of the COVID-19 measures taken in five African countries, namely, Kenya, Malawi, Mozambique, South Africa and Zambia. The overarching aim is to assess the level or intensity of restrictions and the rights implications of these.

2. Procedure for declaring or imposing restrictions

In varying degrees, the Constitutions of each of the five countries in this survey contain provisions with reference to exceptional circumstances in the form of a State of Emergency (SoE), State of Disaster (SoD) and/or State of Calamity (SoC). All five countries also have statutory provisions dealing with exceptional situations. While the initial response to COVID-19 of some countries was to declare an SoE/SoD/SoC, as provided for by their respective constitutions, this was not universal as others opted to rather enact selective legislative provisions and not declare a general SoD or SoE. In these countries, it was argued that a general SoE or SoD would repress human rights and severely cripple the socio-economic situation of already impoverished populations.

In Kenya, the government relied on two legislative provisions, notably the Public Order Act and Public Health Act to create a Curfew Order and Health Rules.³ The Curfew Order restricted population movement between the hours of 19:00 and 04:00 and the Health Rules stipulated regulations relating to issues such as social-distancing requirements, and the disposal of COVID-19 positive bodies.⁴ Similarly, in Zambia, although the Constitution makes provision for a State of Public Emergency and a

³ Republic of Kenya, Kenya Public Order Act; Republic of Kenya, Kenya Public Health Act, No 21.

⁴ Legal Notice 36 of 2020, Public Order (State Curfew) Order; Public Health (Prevention, Control and Suppression of COVID-19) Rules of 2020; Public Health (Restriction of Movement of Persons and Related Measures) Rules.

Threatened Emergency (a pre-emptive approach to a pending emergency), the government chose to rather invoke provisions of the Public Health Act to create COVID-19 Health Rules.⁵ These Rules dealt with issues such as the conversion of buildings to hospitals and regulations related to the entry and exit of persons in infected areas. Just like the Kenyan Health Rules, the Zambian Health Rules were established to curb the spread of the virus. However, unlike in Kenya, no curfew was imposed in Zambia as the government openly stated that a curfew and total lockdown would negatively impact the population.⁶ As a result, only Health Rules and a series of announcements, of uncertain status, made by the President guided the restrictions in Zambia.

At the onset of the pandemic, the Malawi government declared an SoD and lockdown to restrict population movement as a measure of curbing the spread of the virus.⁷ However, this decision was challenged and overturned in the High Court as the government had not put in place measures to cushion the effects of the intended lockdown.⁸ The controversy happened midst a change of government and while the inclination of the new government was to declare an SoE, it did not happen. Instead, the new government declared another SoD and put in place Public Health regulations dealing with a curfew and restrictions on market hours, but not a lockdown.⁹

On 30 March 2020 the Mozambican government declared an SoE as provided for in the Constitution.¹⁰ This provision is applicable to situations of high threat to the State, such as cases of actual or imminent aggression, serious threats or disturbance of the constitutional order or public calamity.¹¹ An SoE declaration may not exceed 30 days, but can be extended three times if the reasons for its declaration remain.¹² The government extended the declaration three times (in April, May and June 2020). In August 2020 the prevailing conditions resulted in the need to further extend the SoE, however, because the terms for extension under the Constitution was exhausted, a further extension was made under the legal provision of Law n. 15/2014 which establishes the framework for the management of disasters.¹³ Decree n.79/2020 of 4 September 2020 ended the SoE and Mozambique has since 7

⁵ Republic of Zambia, Public Health (Infected Areas) (Coronavirus Disease 2019) Regulations, No. 22.

⁶ Phiri, C, 'A Total Lockdown Cannot Work in Zambia'.

⁷ 'President Mutharika Declaration of State of Disaster', 20 March 2020; Republic of Malawi, Section 32 Disaster Preparedness and Relief Act (Disaster Act).

⁸ S v President of Malawi and Others; Ex Parte: Kathumba and Others (Judicial Review Cause No. 22 of 2020) MWHC 7.

⁹ President Mutharika Declaration of State of Disaster, 2020.

¹⁰ Article 290(1), Constitution of the Republic of Mozambique.

¹¹ Article 290(1), Constitution of the Republic of Mozambique.

¹² Republic of Mozambique, Article 292, Constitution.

¹³ Republic of Mozambique, Law n.15/2014 establishing the legal framework for disaster management.

September 2020 been in a State of Public Calamity (SoC)(*calamidade pública*).¹⁴ A calamity is considered to be an abnormal event caused by a major disaster causing damage, loss and compromises the response-capacity of the State.¹⁵ The SoC was accompanied by regulations as provided for in the Disaster Management and Risk Reduction Law.¹⁶

In South Africa, an SoD was declared in March 2020 in terms of the Disaster Management Act, which is the authority for all disaster management in the country. It provides for an integrated and co-ordinated disaster management policy to manage disasters at all spheres of government (national, provincial and local).¹⁷ The Minister of Co-operative Governance and Traditional Affairs is designated to make regulations relating to disasters. On 27 March 2020, an initial three-week ‘hard’ lockdown with a curfew (further extended by two-weeks) was declared.¹⁸ The legal framework also provided for a five-level alert strategy to regulate lockdown levels with Level 5 being the most restrictive and Level 1 the least.¹⁹ The SoD which was initially in place for three months, has been renewed on a monthly basis since June 2020 and restriction-levels are adjusted to address fluctuating infection rates.

3. Role of legislatures in establishing and complying with COVID-19 restriction procedures

The legislatures in the five countries played different roles in the formulation and declaration of COVID-19 related measures and procedures at different stages. In Mozambique, while Parliament developed and promulgated COVID-19 related law, it was the Council of Ministers that issued decrees to add details and specificity to these laws.²⁰ At the onset of the pandemic, the South African and Zambian parliaments were suspended and played a limited role in managing as well as overseeing COVID-19 responses.²¹ In the case of Zambia, the National Assembly was indefinitely suspended in

¹⁴ Republic of Mozambique, Decree n. 79/2020.

¹⁵ Republic of Mozambique, Decree n. 79/2020.

¹⁶ Republic of Mozambique, Lei de Gestão e Redução do Risco de Desastres, Lei 10/2020.

¹⁷ Republic of South Africa, Preamble, South Africa Disaster Management Act,; Section 26(1), Disaster Management Act.

¹⁸ ‘President of South Africa, Mr. C. Ramaphosa, Statement on Measures to Combat Covid-19 Epidemic, Union Buildings, Tshwane’; ‘“Strict” Lockdown Refers to Level 5 of the Alert-Level System of South Africa’s COVID-19 Response.’

¹⁹ Directions Issued in Terms of Regulation 3(3) of The Regulations Made Under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Criteria to Guide the Determination of Alert Levels, published in GN No. 43599 on 7 August 2020.; Section 3, Disaster Management Act Regulations, 2002 published in GN No. 43258.

²⁰ Lorizzo, T, ‘Survey: Mozambique Country Report.’

²¹ Mangwanda, J and Petersen, K, ‘Survey: Zambia Country Report.’; Petersen, K, ‘Survey: South Africa Country Report.’

March 2020, and upon resumption in June 2020, was again adjourned for a period of time. Political commentators have argued that the suspension of Parliament by the ruling Patriotic Front Party was a pretext to avoid the defeat of the Constitutional Amendment Bill in Parliament which would have provided the President with powers to amend the electoral layout and take control of the central bank monetary policy ahead of the August 2021 elections.²² In March 2020, the South African government suspended the work of Parliament as a precautionary measure. The legislature resumed activities virtually in mid-April and prioritised the various government departments' COVID-19 response measures.²³

In March 2020 the Kenyan Senate passed a resolution establishing the *Ad-Hoc Committee on the COVID-19 Situation in Kenya*.²⁴ The Committee's mandate was to oversee actions and measures taken by the national and county governments in addressing the spread of COVID-19.²⁵ The Committee engaged with various stakeholders on legislative, policy and other interventions that the government should consider when addressing the pandemic.²⁶

4. Body or structure in charge of imposing restrictions

The five countries under review co-ordinated their response to the COVID-19 pandemic differently. While some countries established formal structures to drive their response, in other countries, there was little clarity on the co-ordinating authority in charge of effecting regulations. In Zambia, for instance, although health regulations were issued by the Minister of Health through provisions of the Public Health Act, the Executive (President) also drove the imposition of restrictions through a series of announcements which do not appear to have any legal backing.²⁷ In Kenya, two main bodies drove the imposition of restrictions, namely the National Security Council and the National Emergency Response Committee (NERC). The latter is a formal structure established by the President through an Executive Decree to advise him on the evolving threat of the virus and appropriate public health

²² Center for Human Rights, 'COVID-19 Database: Zambia'; Kizzi, A, 'Zambian President's Bid to Amend Constitution Fails'.

²³ Parliament of South Africa, 'Review of Parliament'.

²⁴ Republic of Kenya, 'Senate Ad-Hoc Committee on COVID-19 (2020) First Progress Report'.

²⁵ Republic of Kenya, 'Senate Ad-Hoc Committee on the COVID-19 Situation in Kenya (2020) Third Progress Report'.

²⁶ Parliament of Kenya, 'The Senate Ad-Hoc Committee on COVID-19 Pandemic Chaired by Senator John'.

²⁷ Mangwanda, J and Petersen, K, 'Survey: Zambia Country Report.'

measures to take.²⁸ In Mozambique, the Council of Ministers was established and authorised to specify the measures for the SoE and SoC.²⁹

In Malawi, a Special Cabinet Committee was established by the President to coordinate the country's response to the pandemic. However, due to growing criticism over its handling of the pandemic, the Committee was dissolved by the President and replaced with a 21-member Presidential Task Force comprised of Cabinet Ministers as well as other key stakeholders.³⁰ In South Africa, the National Coronavirus Command Council (NCCC) was the authority charged with making and changing COVID-19 related restrictions. A High Court challenge claimed that the President and the National Executive unlawfully usurped Parliament's powers by establishing and granting powers to the NCCC whereas powers ought to vest with the National Disaster Management Centre. The Court dismissed the claim on account that the President's decision to establish the NCCC was neither a decision made in terms of legislation, nor are the decisions of the NCCC capable of having legal consequences because they are subject to acceptance, rejection or modification by Cabinet and where applicable, individual Cabinet members.³¹

While the above structures held and continue to hold immense powers in co-ordinating their respective countries' COVID-19 responses, they have not been without challenges. Firstly, the functions have not always been clear and certain decisions are not always open to public scrutiny. Furthermore, the centralisation of control, the suspensions of parliaments in some countries and the issuance of far-reaching control measures through regulations must be seen as undermining the general principles of an open and accountable democracy. Moreover, changes in the composition of co-ordinating structures have taken place over the last 18-months. These changes have been on account of incoming Cabinet Ministers (i.e. after the Malawi June 2020 General Elections); untimely deaths (i.e. two Cabinet Ministers in Malawi and one in South Africa due to COVID-19 related complications);³² and most concerning, due to alleged corrupt activities by key personalities (i.e. Minister of Health in South Africa and the Head of the COVID-19 Presidential Taskforce in Malawi).³³

²⁸ Mangwanda, J, 'Survey: Kenya Country Report.'

²⁹ Lorizzo, T, 'Survey: Mozambique Country Report.'

³⁰ Kao, K et al., 'The ABCs of Covid-19 Prevention in Malawi: Authority, Benefits, and Costs of Compliance'.

³¹ Esau and Others v Minister of COGTA and Others (5807/2020).

³² Kato, R, 'Two Malawian Ministers Die of Covid-19 on Same Day'; 'Jackson Mthembu Dies of Covid-19-Related Complications'.

³³ South African Government, 'President Cyril Ramaphosa Places Minister Zweli Mkhize on Special Leave'; Pensulo, Charles, 'Malawi Sacks Heads of Covid-19 Taskforce amid Audit of Use of Funds'.

Other challenges to the roles and functions of the co-ordinating structures are highlighted in the individual country reports.³⁴

5. Procedure for the extension of restrictions

The co-ordinating structures described above have the pivotal task of deciding whether to extend, reduce or remove COVID-19 restrictions and it is important that these decisions are taken based on expert knowledge and scientific information. The South African government is guided by a 'risk adjusted strategy' to determine the level of restrictions to impose based on a five-level 'COVID-19 Alert System.' This system guides the Cabinet's decisions to extend, remove or limit the SoD to a particular area and also determines the applicable regulations. This risk-adjusted strategy is guided by several variables such as: the level of infections and rate of transmission; the capacity of health facilities; the extent of the implementation of public health interventions, and the economic and social impact of continued restrictions.³⁵

Unlike South Africa, Kenya did not make use of an alert-level system. Instead, it appears that high infection rates determined the extension and removal of curfew hours and movement restrictions in certain counties. For example, in April 2020, strict movement restrictions were placed for three weeks on four counties with reported high infection rates. It was explained that these restrictions were placed due to fears that Easter-weekend travellers would spread the virus across the country.³⁶ It is not clear on which basis decisions to extend or limit restrictions in Malawi were made, however, a change of government in Malawi occurred in June 2020 and new regulations were issued relating to curfews and market hours.³⁷ In January 2021 it was reported that the incoming President was considering establishing an SoE after an increase in COVID-19 cases, a rise in hospitalisations, and the passing on of two Cabinet Ministers.³⁸ However, no such declaration was made.

³⁴ 'Survey: Kenya Report, Survey: Malawi Country Report, Survey: Mozambique Country Report, Survey: South Africa Country Report, and Survey: Zambia Country Report.'
Directions Issued in Terms of Regulation 3(3) of The Regulations Made Under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Criteria to Guide the Determination of Alert Levels, published in GN No. 43599 on 7 August 2020.; Section 3, Disaster Management Act Regulations, 2002 published in GN No. 43258..

³⁶ Al Jazeera, 'COVID-19: Kenya Bans Travel in and out of Nairobi, Other Areas'.

³⁷ 'President Chakwera National Address'.

³⁸ Kato, R, 'Two Malawian Ministers Die of Covid-19 on Same Day'.

In Mozambique, changes to restrictions were made on a monthly basis. Presidential decrees are drafted by the President and submitted to Parliament for ratification. Once ratified, the Council of Ministers determines the specific implementation measures. For example, when the Presidential Decree pertaining to the re-opening of schools was considered, it was the Minister of Education who determined the process for the re-opening.³⁹

In comparison to other countries, changes to measures in Zambia were communicated through a series of non-gazetted Presidential announcements.⁴⁰ It is not clear where the mandate and authority for these measures emanate from, nor is it clear if these measures were made as a result of consultation and engagement between the President and his Cabinet.⁴¹ In August 2021, a change of government occurred in Zambia and in September 2021, the newly elected President appointed a COVID-19 Advisor as a means of dealing with challenges brought on by the pandemic.⁴² This raises questions regarding the extent of stakeholder consultations between the co-ordinating structures (mostly made up of Cabinet Ministers) and external bodies (civil society, medical professionals, academics, general public, business and private sector bodies) in all five countries' response to the COVID-19 pandemic.

6. Extent of stakeholder consultation

In each of the reviewed countries, there is evidence of stakeholder consultation between government and civil society, medical professionals, the general public, academics, and the private sector. However, there is not enough information available in the public domain to confirm the extent of such engagement. In Kenya, a series of consultations took place between the different arms of government and civil society as is documented in a series of reports by the Ad-hoc Senate Committee. The Committee was tasked with receiving submissions from the general public and civil society organisations regarding the decisions taken by the government.⁴³ While the Ad-Hoc Committee is said to have analysed and forwarded these submissions to the NERC, civil society organisations subsequently complained that concerns raised were not considered by the NERC.⁴⁴ In South Africa, there was stakeholder consultation in the days leading up to the declaration of an SoD on 27 March

³⁹ Lorizzo, T, 'Survey: Mozambique Country Report.'

⁴⁰ Kalunga, F, 'Executive Disorder, Constitutionalism and Covid-19 in Zambia'.

⁴¹ Mangwanda, J and Petersen, K, 'Survey: Zambia Country Report.'

⁴² Xinhau, 'Zambian President Says Bringing COVID-19 under Control Crucial for Economic Transformation'.

⁴³ Republic of Kenya, 'Senate Ad-Hoc Committee on COVID-19 (2020) First Progress Report'.

⁴⁴ Republic of Kenya, 'Senate Ad-Hoc Committee: Fourth Progress Report'.

2020. There is evidence, mostly contained in official press releases and media briefings that the government engaged in a range of consultations with members of the legislature, political parties, business, trade unions, community constituency, premiers, mayors, representatives of the South African local government association, representatives of inter-faith communities, oversight institutions and other stakeholders immediately after the National State of Disaster declaration.⁴⁵ To date there continues to be stakeholder engagements as is mentioned each time the President addresses the nation to announce changes to lockdown levels.

The situation was different in Mozambique as it appears unlikely that any stakeholder consultations took place prior to the SoE declaration. However, some changes in the enforcement of SoE provisions occurred following pressure from external stakeholders raising concerns about particular issues. For example, in June 2020, a civil society organisation, Reform for Mozambique (REFORMAR) wrote an open letter to the government highlighting problems and irregularities with the enforcement of the SoE which led to the declassification of the crime of 'disobedience'.⁴⁶ This is a positive indication of government taking into account the views of civil society during the pandemic, but it also seems that this was an ad hoc intervention and not emanating from a formal process of dialogue and consultation.

There is limited information available on stakeholder consultation in Malawi although it is presumed that engagements occurred within the Presidential Task Force which replaced the Presidential Committee. The Task Force is co-chaired by a public health expert from the Malawi College of Medicine and includes nine Cabinet Ministers as well as key stakeholders. It is reported that the influential Christian Health Association of Malawi (CHAM) and the Chiefs' Council are also represented in the Taskforce.⁴⁷ Wider engagements could not be confirmed.

Similar to the situation in Malawi, there is limited information regarding stakeholder consultation in Zambia.⁴⁸ Available information suggests that Cabinet Ministers consulted amongst themselves on a number of occasions to approve decisions related to COVID-19.⁴⁹ Sources indicate that a number of Ministers, notably, those in charge of Health and Finances, were instrumental in putting in place

⁴⁵ Ramaphosa, C, 'PMG: Report of the Meeting of the Portfolio Committee on Portfolio Committee on Cooperative Governance and Traditional Affairs of 21 April 2020, Address by President Cyril Ramaphosa to the Joint Sitting of Parliament on South Africa's Economic Reconstruction and Recovery Plan'.

⁴⁶ Lorizzo, T, 'REFORMAR's Open Letter to Government'; Republic of Mozambique., Presidential Decree 21/2020.

⁴⁷ Kao, K et al., 'The ABCs of Covid-19 Prevention in Malawi: Authority, Benefits, and Costs of Compliance'.

⁴⁸ Center for Human Rights, 'COVID-19 Database: Zambia'.

⁴⁹ Redpath, J, 'Survey: Malawi Country Report'.

regulations to mitigate the health and economic costs of the virus.⁵⁰ There is also evidence that as part of efforts to alleviate the socio-economic burden on citizens, consultations took place with private sector representatives to waive rental costs for businesses that suffered during the pandemic.⁵¹ There is limited information available on the government's engagement with civil society; but it is reported that a number of civil society organisations have resisted measures proposed by the government.⁵²

7. Pandemic-specific law

The constitutions and laws of the five countries covered in this report had some form of emergency measure provisions available which were used in response to COVID-19. Although some of the provisions generally speak to 'emergencies' and 'disasters', they do not necessarily make use of the term 'pandemic'. Save for three countries that already had legislation covering 'pandemics', two of the surveyed countries have subsequently included pandemic-related terminology and developed pandemic-specific laws to guide possible future pandemics. For example, the Mozambican Parliament has recently tabled and enacted the Disaster Risk Management and Reduction Law (*Lei de Gestão e Redução do Risco de Desastres*). It amends Law no. 15/2014 and introduces the term 'pandemic' to the legislative framework to make it as comprehensive as possible and respond to any type of disaster that may occur.⁵³ Kenya has drafted the Pandemic Response and Management Bill, setting a legal framework for coordinating and managing responses, activities and temporary measures and relief during future pandemics.⁵⁴ From a preliminary reading of the Bill, there are several justifiable provisions in the Bill about disaster responses and economic relief during a pandemic. However, some other provisions may be a case of over-reach and vagueness, posing a risk to fundamental rights and freedoms for an indefinite and unspecified duration.⁵⁵ At the time of writing (September 2021), the Kenyan Senate had passed the Bill with amendments and the Bill was referred to the National Assembly for debate; if successful, it will be forwarded to the President for approval and enactment.

Unlike Kenya and Mozambique, the governments of Malawi, South Africa and Zambia have not created new 'pandemic-specific' laws. In Zambia, the Constitution is clear regarding the derogation from fundamental rights and detention, except for non-derogable rights such as the right to protection

⁵⁰ Effective States and Inclusive Development, 'Zambia's Response to COVID-19'.

⁵¹ Africa News Agent, 'Coronavirus in Africa: Zambia Won't Survive Lockdown'.

⁵² Effective States and Inclusive Development, 'Zambia's Response to COVID-19'.

⁵³ Republic of Mozambique., 'Mozambique "Proposta de Lei de Gestão e Redução Do Risco de Desastres Vai Suprir Lacunas Na Lei de Gestão de Calamidades"'.

⁵⁴ Republic of Kenya, 'The Pandemic Response and Management Bill (No.6 of 2020)'.

⁵⁵ Republic of Kenya, Article 39(2)(b), Pandemic Response and Management Bill.

from torture, inhumane and degrading punishment or treatment.⁵⁶ These rights may not be derogated even when a declaration of a Public Emergency or a Threatened Emergency is made.⁵⁷ These emergency provisions, although not invoked in respect to COVID-19, are further explained in the Emergency Powers Act.⁵⁸ Similarly, Malawi and South Africa already have constitutional and legislative provisions available that cover ‘pandemic-like’ circumstances, although the term ‘pandemic’ is not explicitly used.⁵⁹

8. Conclusion

This report highlights the measures taken by the five governments in response to the COVID-19 pandemic. The unprecedented nature of the pandemic has been a stress-test for constitutional and legislative emergency provisions. While the governments’ promptness and willingness to respond to the pandemic is commendable, it is difficult to overlook the uncertainties brought about by the vagueness in law and regulations, as well as the ease with which democratic protections were rolled back. There is a fear and a high risk that some measures invoked during the COVID-19 pandemic have set a precedence for future decisions. It is imperative that, irrespective of the context of possible future pandemics, that the upholding, promotion and advancement of human rights should always be a central focus of governments’ response towards its citizens.

⁵⁶ Republic of Zambia, Article 25, Zambia Constitution.

⁵⁷ Republic of Zambia., ‘Article 25, Zambia Constitution.

⁵⁸ Republic of Zambia, The Emergency Powers Act.

⁵⁹ Republic of South Africa, Disaster Management Act 57; Republic of Malawi., Malawi Disaster Preparedness Relief Act.

Litigating the lockdown

Kristen Petersen

1. Introduction

COVID-19 resulted in States across the world implementing “lockdowns” in the form of curfews, stay at home orders and other restrictive measures, impacting the daily activities and livelihoods of citizens. Whilst these measures may be necessary to protect lives, upholding the rule of law during such unprecedented times still remains fundamental to safeguarding the rights of people. During this period, courts have played a pivotal role in testing the limits of States’ responses to the pandemic. There have been a number of legal challenges to statutory lockdown declarations and their accompanying rules and regulations in the countries surveyed. This is particularly relevant in countries such as Kenya, Malawi and South Africa. Although there is no public information available on the nature and scope of legal challenges on COVID-19 cases in Mozambique and Zambia, these countries still encountered related challenges, such as to the use of force by law enforcement officials in the enforcement of lockdown rules.

This report provides a brief comparative overview of COVID-19 related litigation courts were confronted with.

2. Legislative, procedural and other challenges

In Kenya, Malawi and South Africa there were legal challenges to the State’s decision to institute “lockdowns,” which were either in the form of Curfew Orders, declaring an SoD or other formal legislative mandates.

It was only in Malawi where litigation against the State’s decision to declare a lockdown was successful. A Malawian the civil rights group, Human Rights Defenders Coalition (HRDC), challenged the State’s decision to implement a lockdown on the basis that, amongst others, the lockdown amounted to a substantial derogation of rights and did not accompany the attendant SoE declaration,

and that the State failed to make provision for social security to its poor citizens during the lockdown.⁶⁰ The Court ruled that the lockdown was unconstitutional as it fundamentally restricted rights, for which derogation was only permissible under an SoE.⁶¹ The Court also ruled that the social security interventions to protect the livelihoods of impoverished Malawians to offset the lockdown was woefully inadequate.⁶²

In Kenya and South Africa, the lockdown declarations (in the form of respectively SoD and Curfew Orders) were viewed as appropriate and as a legitimate state response to deal with the pandemic, as set out below.

In South Africa, the SoD declaration under the Disaster Management Act was first challenged by a Mr. De Beer and by a voluntary community association known as the Liberty Fighters Network on the basis that it was an 'irrational reaction to the coronavirus and the number of deaths caused thereby'.⁶³ The Court dismissed the Applicants' position and took into account the global outbreak of the virus, pronouncements by the World Health Organisation (WHO) as well as the absence of treatment and vaccines available at the time.⁶⁴ In another challenge, the State's decision to declare an SoD as oppose to an SoE (as provided under section 37 of the Constitution) was challenged on the basis that it lacked the constitutional safeguards that are available under an SoE (i.e. parliamentary approval to extend SoE and emergency rules, etc.) and therefore did not protect citizens against 'unjust and irrational decisions and regulations made by the State'.⁶⁵ The Court dismissed the case noting that the COVID-19 circumstances presented did not warrant an SoE declaration and further ruled that the necessary constitutional safeguards are in place under an SoD.⁶⁶

⁶⁰ The State on application of Kathumba and others v President of Malawi and Others (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 at 6.

⁶¹ The State on application of Kathumba and others v President of Malawi and Others (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 at 27–33.

⁶² The State on application of Kathumba and others v President of Malawi and Others (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 at 39.

⁶³ 'De Beer and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020)', para. 3.1.

⁶⁴ 'De Beer and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020)', para. 4.12.

⁶⁵ 'Freedom Front Plus v President of the Republic of South Africa and Others (22939/2020) [2020] ZAGPPHC 266; [2020] 3 All SA 762 (GP) (6 July 2020)'.

⁶⁶ i.e. That the life of the nation is under threat from COVID-19, or that peace and security need to be restored.

The constitutionality of the Curfew Order in Kenya was challenged on the grounds that it was ‘illegal, illegitimate and unproportionate’ and ‘blanket in scope and indefinite in length.’⁶⁷ It was also argued that the Curfew did not demonstrate what legitimate public health or other interest it sort to achieve.⁶⁸ The fact that the State did not declare an SoE under Article 58 of the Constitution was also raised as an issue.⁶⁹ The Court upheld the legality of the Curfew and found that the Curfew Order to restrict contact between persons in order to slow the spread of COVID-19 was legitimate.⁷⁰

2.1. Challenge to COVID-19 curfews, norms and standards

COVID-19 measures and curfew provisions were challenged in different ways and on a number of grounds in Kenya, Malawi and South Africa. Although the information available indicate that there were no legal challenges to COVID-19 measures implemented in Zambia, the rules announced by the President were without seemingly any legal backing, which made it difficult for citizens to comply with them.⁷¹ Moreover, in Mozambique, provincial and municipal governments seem to have taken a number of measures beyond what the law mandates and the enforcement and sanctions, especially in the beginning, were not specific and open to abuse.⁷²

Out of all the countries surveyed, South Africa has the most elaborate and highly regulated lockdown restrictions.⁷³ These introduced a five-level COVID-19 alert system which contains incremental degrees of compliance with rules and regulations (such as curfew times, industry operation of services, etc).⁷⁴ This risk-adjusted approach is guided by several criteria, including the level of infections and rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions and the economic and social impact of continued restrictions. Since South Africa

⁶⁷ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] eKLR, para. 127 <<http://kenyalaw.org/caselaw/cases/view/193192/>>.

⁶⁸ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] ECLR, paras 11-14.

⁶⁹ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others ; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] eKLR paragraph 14.

⁷⁰ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] ECLR, para 132. The Court initially found that the Curfew Order failed to comply with the Public Order Act in that it initially failed to indicate the authority or person to grant written permit for persons who for good reason cannot remain indoors during the curfew hours; but this was later amended to comply with the Public Order Act.

⁷¹ ‘University of Pretoria, “Centre for Human Rights COVID-19 Response: Zambia”’.

⁷² ‘Survey of COVID-19 Lockdown Measures Taken in Five African Countries: Mozambique’.

⁷³ ‘Regulations and Guidelines - Coronavirus COVID-19 | South African Government’.

⁷⁴ ‘About Alert System | South African Government’.

declared a lockdown, there have been a number of legal challenges contesting the constitutionality of the regulations imposed under the SoD, the scope of some legal challenges involved a blanket attack on the regulations and others involve specific challenges to the regulations, such as the regulation prohibiting the sale of tobacco products, e-cigarettes and related products and the ban on religious gatherings during the initial stages (i.e. COVID-19 Alert Levels five-four) of the national disaster lockdown.⁷⁵ Generally, the Courts held that in order to determine the constitutionality of the regulations, the regulations must be rationally related to the purpose for which the power was conferred. In assessing the rationality of the regulations, it had to consider whether a rational connection exists between a legitimate government purpose and the means selected by the state to pursue this purpose. If there is no rational connection, the limitation of rights which the regulations require would not be a permissible limitation in terms of section 36 of the Constitution. In almost all the legal challenges to the regulations (with the exception of two regulations) the Court determined that the regulations were rational and justified.⁷⁶

In Kenya, the COVID-19 measures (Public Health Rules)⁷⁷ were challenged on the basis that they were vague, discriminatory, and enacted without any public participation.⁷⁸ The absence of Parliamentary

⁷⁵ 'De Beer and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020)'; 'De Beer N.O and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2021] ZAGPPHC 67 (19 February 2021)'; 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021)'; 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020)'; 'Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another (21688/2020) [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) (26 June 2020)'; 'Freedom Front Plus v President of the Republic of South Africa and Others (22939/2020) [2020] ZAGPPHC 266; [2020] 3 All SA 762 (GP) (6 July 2020)'; 'Mohamed and Others v President of the Republic of South Africa and Others (21402/20) [2020] ZAGPPHC 120; [2020] 2 All SA 844 (GP); 2020 (7) BCLR 865 (GP); 2020 (5) SA 553 (GP) (30 April 2020)'.

⁷⁶ 'De Beer N.O and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2021] ZAGPPHC 67 (19 February 2021)'; 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021)'. In De Beer case, the High Court ruled that the regulations were unconstitutional but the Appeal overturn the decision of the High Court. In the Esau case, the High Court ruled the regulations constitutional and this decision was taken to the Appeal Court. The Appeal Court largely upheld the High Court's ruling but the following two regulations were declared invalid: (a) regulation 16(2)(f) of the regulations promulgated in GN 480, Government Gazette 43258 of 29 April 2020 (the level 4 regulations) is invalid to the extent that it limited: the taking of exercise to three means, namely walking, running and cycling; the time during which exercise could be taken to the hours between 06h00 and 09h00; and the location for taking exercise to a radius of five kilometers from a person's residence; and (b) items 1 and 2 of Part E of Table 1, read with reg 28(3), of the level 4 regulations are invalid to the extent that they prohibited the sale of hot cooked food, otherwise than for delivery to a person's home.'

⁷⁷ 'The Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020'.

⁷⁸ Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020, eKLR. paragraph 1 (a).

approval was also challenged.⁷⁹ It was argued that the rule on mandatory mask wearing in public and the penal sanctions for non-compliance discriminated against poor persons on the basis of their socio-economic status and the rule on the cremation of bodies of those who died from the coronavirus does not accord them with dignity and respect to their families.⁸⁰ The Court noted that the COVID-19 measures were reflective of the steps taken the world over in the fight against COVID-19 and that the rules were not irrational (i.e. the Court noted that it was not irrational to limit the number of persons being transported in private and public vehicles and also to require a lone driver in a vehicle to wear a mask to limit instances of transmission of virus with any subsequent person who come in contact with the subject vehicles.)⁸¹ The Court ruled that the restrictions were proportionate and reasonable in an open and democratic society, noting that the freedoms under the Constitution are enjoyed only to the extent that they do not pose a risk to others.⁸² Furthermore, the constitutionality of the Curfew Order was successfully challenged by the Law Society of Kenya on the basis that it omitted legal representation from the list of essential services despite the fact that those arrested under the Curfew Order require legal representation.⁸³ The State was ordered to amend the Schedule to the Curfew Order to include lawyers including the Independent Police Oversight Authority (IPOA).⁸⁴

In Malawi, before the lockdown was declared unconstitutional, students at the University of Malawi approached the Court for a judicial review of the University's announcement to close as a precautionary measure against COVID-19.⁸⁵ The Applicants were denied judicial review on the basis that, amongst others, that they had alternative remedies.

2.2. Access to information and the right to public participation

Access to information on the pandemic and ensuring that the public are informed of what the laws and rules are, was a major challenge in Kenya and Mozambique. It was reported that the Courts in Kenya will hear a petition challenging the State's failure to proactively publish and publicize important

⁷⁹ Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020, eKLR. paragraph 3.

⁸⁰ Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020, eKLR. paragraph 2.

⁸¹ Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020, eKLR. paragraph 121.

⁸² Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020, eKLR. paragraph 124.

⁸³ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others ; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] eKLR paragraph 17. It was argued that this violates the rights of arrested persons as well as the right to fair hearing and right to fair trial.

⁸⁴ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] ECLR, para. 154.

⁸⁵ 'State v The President of Malawi et al Ex Parte Mponda, Soko et al (Judicial Review Number 13 of 2020) [2020] MWHC 6 (07 April 2020); | Malawi Legal Information Institute'.

information about the COVID-19 pandemic violates the right to access to information.⁸⁶ Unfortunately, the status of this petition could not be ascertained.

The lack of public consultation in the promulgation of lockdown rules was one of the procedural fairness arguments in the courts in Kenya and South Africa.⁸⁷ In both countries, the courts found that given the gravity and exigency of the COVID-19 pandemic, it is reasonable and justifiable that extensive public participation did not take place.⁸⁸ In South Africa, the court held that the legislation governing national disasters does not contain provisions on public participation before making regulations, but only provides that the Minister should consult relevant Cabinet members.⁸⁹ The court held that even if the Minister made regulations without public participation the public's check and balance on abuse of power still resides with Parliament to whom the Minister is accountable for the exercise of delegated power to make subordinate law.⁹⁰ In Kenya, the court held that the rules were undertaken within the context of extreme necessity and in the context of the rapid spread of COVID 19 and in such a situation, the law permits within the context of the prevailing circumstances.⁹¹

2.3. The use of force by law enforcement officials in enforcing the lockdown.

The use of force by law enforcement officials in enforcing the lockdown rules was a concern in all countries surveyed. The Courts in South Africa and Kenya have ruled against the abuse of power of law enforcement agencies. In Kenya and South Africa, the absence of law enforcement guidelines and non-adherence to operational procedures during the pandemic appear to be a common problem.⁹²

⁸⁶ 'MEDIA ADVISORY'.

⁸⁷ 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020)' para 129; *Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020*, ECLR, paras 9,11,81,88.

⁸⁸ *Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020*, ECLR, paras 88-95.; 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020)', paras 164-172.

⁸⁹ 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020)', para. 161.

⁹⁰ 'Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020)', para. 164.

⁹¹ *Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) Constitutional Petition No. 132 of 2020*, eCLR. paragraph 88.

⁹² 'Khosha and Others v Minister of Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)'; *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others ; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] eCLR.*

The Court in Kenya declared the police's unreasonable use of force in enforcing the Curfew Order, unconstitutional.⁹³ The Court found that the National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights and demanded that the police provide guidelines for observing the curfew. In South Africa, following the death of Collin Khosa at the hands of members of the security forces in enforcing the lockdown, the Court was asked to confirm existing rights protection available to citizens during an SoDs and to ensure that government, and by implication the public, are aware of the requirements.⁹⁴ The Court confirmed that all persons present within South Africa are entitled to non-derogable rights and ordered the South African security services to instruct all its members to act in accordance with the Constitution and the law, and to develop and publish a code of conduct and operational procedures.⁹⁵ In Zambia, despite the lack of litigation, there were reports of police brutality and arbitrary detention. This occurred despite the COVID-19 standard operating enforcement procedures drafted by the Zambia Police Service with the Human Rights Commission and United Nations Development Programme to guide security and law enforcement officers in enforcing COVID-19 measures.⁹⁶

3. Conclusion

Three issues stand out from this brief comparative analysis as common concerns in the countries surveyed:

- the lack of legislative oversight over the lockdown rules and measures,
- the lack of public participation in the promulgation of rules, and
- the use of force by law enforcement agencies in the enforcement of the lockdown

These core issues, which litigants challenged on the basis of its unconstitutionality, requires further examination and deliberation because issues such as legislative oversight, public participation and upholding the rule of law are fundamental components of democracies. The Courts in Malawi, South

⁹³ *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others*; Kenya National Commission on Human Rights & 3 Others (Interested Parties) [2020] EKLK, para. 154 (a).

⁹⁴ *Khosa and Others v Minister of Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)', para. 4.

⁹⁵ *Khosa and Others v Minister of Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)', para. 146. i.e. The right to human dignity, the right to life, the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way, etc

⁹⁶ 'Amnesty International (2020) "Zambia"; 'Zambia Police (2020) "Zambia Police Launches Standard Operating Procedure on COVID-19"'.

Africa and Kenya played a fundamental role in assessing the constitutionality of restrictive measures during this period. Courts played an important role during and following the initial stages of the pandemic, in particular to ensure judicial scrutiny of emergency legislation and to provide an effective remedy against excessive emergency measures in individual cases.⁹⁷ They fulfilled their role in safeguarding and condemning rights violations by law enforcement agencies in the enforcement of lockdown and, in the case of Malawi, were alive to the socio-economic impact of restrictive measures on the poor in society. It appears that the litigation in these countries and a reliance on the judiciary to confirm whether or not rights-limiting COVID-19 measures were constitutionally sound, stem from a lack of trust in the government's implementation of measures to deal with the pandemic. Moving forward, it will be important to draw lessons from the COVID-19 pandemic period by examining the core common problems these countries experienced in order to improve their pandemic preparedness and to generate the trust and confidence of citizens in their government.

⁹⁷ 'PRIMER: The Functioning of Courts in the Covid-19 Pandemic', 4.

Impact on Civil and Political Rights

Jean Redpath

1. Introduction

Civil and political rights probably find their best universal expression in the International Covenant on Civil and Political Rights (ICCPR).⁹⁸ All five countries under review are states parties to the ICCPR.⁹⁹ In this report the impact of COVID-19 restrictions on these rights will be briefly reviewed, with a particular focus on fair trial rights.

In all the countries surveyed, the restrictions imposed affected civil and political rights, including the right to life¹⁰⁰ (people were killed by police enforcing COVID-19 restrictions in South Africa¹⁰¹, Kenya¹⁰², Mozambique¹⁰³, and Zambia¹⁰⁴), the right not to be subject to torture or cruel inhuman or degrading treatment or punishment¹⁰⁵ (police subjected people to summary punishments in South Africa,¹⁰⁶ Malawi¹⁰⁷, and Kenya¹⁰⁸) the right to liberty and security of the person¹⁰⁹ (people were arrested in

⁹⁸ International Covenant on Civil and Political Rights (ICCPR) Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

⁹⁹ 'OHCHR Dashboard' <<https://indicators.ohchr.org/>> [accessed 20 September 2021].

¹⁰⁰ Article 6(1) International Convention on Civil and Political Rights.

¹⁰¹ Ferial Haffajee, 'ANALYSIS: Ramaphosa Calls 11 Lockdown Deaths and 230,000 Arrests an Act of "over-Enthusiasm" – Really!', *Daily Maverick*, 2020 <<https://www.dailymaverick.co.za/article/2020-06-01-ramaphosa-calls-11-lockdown-deaths-and-230000-arrests-an-act-of-over-enthusiasm-really/>> [accessed 14 September 2021].

¹⁰² 'Kenya: Police Brutality During Curfew', *Human Rights Watch*, 2020 <<https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew>> [accessed 14 September 2021].

¹⁰³ 'Lockdown: Police Officers Beat Man to Death "for Threatening to Film Them Playing Football"' <<https://www.premiumtimesng.com/coronavirus/389397-lockdown-police-officers-beat-man-to-death-for-threatening-to-film-them-playing-football.html>> [accessed 14 September 2021].

¹⁰⁴ 'Zambia 2020 Human Rights Report', 2020, 30.

¹⁰⁵ Article 7 ICCPR

¹⁰⁶ 'Pandemic Policing: South Africa's Most Vulnerable Face a Sharp Increase in Police-Related Brutality', *Atlantic Council*, 2020 <<https://www.atlanticcouncil.org/blogs/africasource/pandemic-policing-south-africas-most-vulnerable-face-a-sharp-increase-in-police-related-brutality/>> [accessed 14 September 2021].

¹⁰⁷ 'Malawian Police Beat Journalist Henry Kijimwana Mhango for Reporting on COVID-19', *Committee to Protect Journalists*, 2021 <<https://cpj.org/2021/01/malawian-police-beat-journalist-henry-kijimwana-mhango-for-reporting-on-covid-19/>> [accessed 20 September 2021].

¹⁰⁸ 'Kenyan Police Accused of Killings, Excessive Force While Enforcing COVID-19 Curfew | Voice of America - English' <<https://www.voanews.com/africa/kenyan-police-accused-killings-excessive-force-while-enforcing-covid-19-curfew>> [accessed 14 September 2021].

¹⁰⁹ Article 9 ICCPR.

relation to infringements of restrictions in all the countries), and the right to freedom of movement (all of the countries imposed curfews or other restrictions on free movement).¹¹⁰

Fair trial rights were also affected, in particular, the right to have adequate time and facilities for the preparation of defence and to communicate with counsel of own choosing¹¹¹, the right to be tried without undue delay¹¹², and the right of the accused to be tried in his or her presence.¹¹³ This was seen in the limits placed on detainees being able to consult with their lawyers, delays to the progress of criminal trials through restrictions on access to the courts, and the preference for remote means of resolution of matters. This will be discussed in more detail below.

2. Fair trial rights affected

2.1. Most courts restricted to hearing 'urgent' matters leading to delay

Restrictions on accessing courts occurred in the countries under review for a number of weeks, and in most countries some form of ongoing or ad hoc restriction continues to operate.

In Kenya, the National Council on Administration of Justice (the judiciary, the police and the Office of the Public Prosecutor), released a statement on 15 March 2020 in which all court sittings were suspended except for urgent matters.¹¹⁴ This had the effect of delaying most matters in court. Bringing prisoners to court for remand hearings was also suspended. Further, the Chief Justice directed all court houses to be closed to the public, and instructed each court station to operate with three members of the judiciary (a judge/magistrate, a court administrator and a court assistant to serve as a customer care service desk contact). The number of cases that were resolved in all courts reduced from 469 359 in the financial year 2018/19 to 289 728 cases in 2019/20 when COVID-19 disease was first reported

¹¹⁰ Article 12 ICCPR.

¹¹¹ Article 14(3)(b) ICCPR.

¹¹² Article 14(3) (c) ICCPR.

¹¹³ Article 14(3) ICCPR.

¹¹⁴ 'Chief-Justice-Press-Statement-Administrative-and-Contingency-Management-Plan-to-Mitigate-COVID-19-in-Kenya's-Justice-Sector.Pdf' <<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Chief-Justice-Press-Statement-Administrative-and-contingency-management-plan-to-mitigate-COVID-19-in-Kenya%E2%80%99s-Justice-Sector.pdf>> [accessed 14 September 2021].
<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Chief-Justice-Press-Statement-Administrative-and-contingency-management-plan-to-mitigate-COVID-19-in-Kenya%E2%80%99s-Justice-Sector.pdf>

in Kenya - a drop of some 38%.¹¹⁵ Temporary closures of courts and reduced access continues to date and are published on the website of the Kenya judiciary.¹¹⁶

Similarly, in Malawi, Mozambique and Zambia, courts only heard urgent matters for a significant time period (two months, six weeks and two weeks respectively).¹¹⁷ In Malawi, non-urgent matters were not initially heard.¹¹⁸

In South Africa, remand prisoners were not prioritised in the courts until the change to Level 3. (In South Africa there were five levels of lockdown, with Levels 5 and 4 being the most restrictive; Level 3 was only implemented after four months of restrictions). The result was that the remand population increased by 14% from the number reported in 2019/20, to 57 000.¹¹⁹ The court directions issued by the Chief Justice postponed “[a]ll criminal trials enrolled during the lockdown” to dates after that period. However, courts were to try cases in instances where it is in the interest of justice to do so. Persons in detention awaiting trial were not be brought to courts except for “first appearance, bail applications and matters where special arrangements have been made with the judicial officers involved in the matters.”¹²⁰ In other cases where the accused was in detention, trials were to be postponed using audio-visual remand centres in correctional facilities, where this is available. All cases where the accused persons are not in detention were postponed until after the end of the lockdown, at which point summons with new trial dates are to be sent to them. Persons accused of committing

¹¹⁵ {Maranga, M Effect of Covid-19 on Resolution of Cases in Courts in the Kenyan Judiciary <https://www.researchgate.net/publication/350513318_EFFECT_OF_COVID-19_PANDEMIC_ON_RESOLUTION_OF_CASES_IN_COURTS_THE_KENYAN_JUDICIARY< [accessed 14 September 2021

¹¹⁶ ‘JudiciaryKE COVID-19 – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/resources/judiciaryke-covid-19/>> [accessed 14 September 2021].

¹¹⁷ ‘Coronavirus Banishes Female Inmates to Far-Flung Jails in Malawi’, *Reuters*, 17 August 2020, section Coronavirus: Full Coverage <<https://www.reuters.com/article/us-health-coronavirus-malawi-women-idUSKCN25D11E>> [accessed 14 September 2021].

Access to Justice During Lockdowns <<https://africanwomeninlaw.com/wp-content/uploads/2021/publications/Access-to-Justice-During-Lockdown-in-Southern-Africa.pdf>> [accessed 14 September 2021].

¹¹⁸ <https://www.africanwomeninlaw.com/posts/COVID-19-AND-MALAWI-COURTS%3A-A-VIEW-FROM-THE-BENCH>

¹¹⁹ ‘Lockdown Case Backlogs; Overcrowding & Release Of Inmates: Minister’s Briefing | PMG’ <<https://pmg.org.za/page/Lockdowncasebacklogovercrowding&releaseofinmatesMinistersbriefing>> [accessed 14 September 2021].

¹²⁰ ‘South Africa: Directions for Court Operations During COVID-19 Lockdown Issued | Library of Congress’ <<https://www.loc.gov/item/global-legal-monitor/2020-04-23/south-africa-directions-for-court-operations-during-covid-19-lockdown-issued/>> [accessed 14 September 2021].

a petty offence were supposed to be released with a warning to appear in court at an appointed future date.¹²¹ In South Africa the remand population clearly increased during 2020.¹²²

In Mozambique, the judicial recession regime¹²³ (recess rules) applied to procedural acts and judicial proceedings.¹²⁴ Thus, with the exception of cases considered urgent, such as those dealing with minors at risk or the custody of detainees, judicial deadlines that expire during the course of the SoE were suspended and transferred to the first working day following the end of the SoE.

In Zambia, the Chief Justice issued directions in relation to criminal matters in March 2020.¹²⁵ The directions deferred all High Court Criminal Sessions at seven seats¹²⁶ only permitting urgent interim reliefs during the 14-day suspension period. In practice, the High Court Registries revealed that the Registries accepted filing of urgent applications in relation to stays of execution, injunctions, judicial review etc.¹²⁷

Most courts in the five countries under review retained some limits to their operation after an initial period of "urgent matters only". This has tended to maintain the backlogs in the courts, as evidenced in the data quoted above for Kenya and South Africa. Such backlogs are likely to persist and worsen under continuing restrictions, unless extraordinary measures are taken. Consequently, there is the situation that convicted persons have been released early under measures to reduce overcrowding to reduce the spread of COVID-19, yet detention of persons on remand is likely to have increased.

¹²¹ 'South Africa: Directions for Court Operations During COVID-19 Lockdown Issued | Library of Congress'.

¹²² Jean Redpath, 'OP-ED: Number of Awaiting-Trial Prisoners Increases under Lockdown', *Daily Maverick*, 2020 <<https://www.dailymaverick.co.za/article/2020-07-27-number-of-awaiting-trial-prisoners-increases-under-lockdown/>> [accessed 23 September 2021].

¹²³ Article 27 of Law 24/2007, of 20 August, as amended by article 11 of Law 11/2018, of 3 October and article 143 of the Code of Civil Procedure.

¹²⁴ 'Legal Implications for Procedural Acts during the State of Emergency - DLA Piper Africa in Mozambique - SAL & Caldeira Advogados, Lda.' <https://www.dlapiperafrica.com/en/mozambique/insights/2020/legal-implications_procedural-acts-covid19.html> [accessed 14 September 2021].

¹²⁵ 'ALN Covid Hub - FAQs - Litigation' <<https://www.africalegalnetwork.com/covidhub/faqs/litigation>> [accessed 14 September 2021].

¹²⁶ Lusaka, Kitwe, Mazabuka, Solwezi, Mongu, Chipata and Kasama

¹²⁷ 'ALN Covid Hub - FAQs - Litigation'.

3. External observers and complaints mechanisms for prisoners and detainees

In Kenya, lawyers were not initially listed as essential services; they were classified as such only after legal action.¹²⁸ In Mozambique, all visits to prisons were suspended.¹²⁹ In South Africa, visits to prison, including by lawyers were suspended.¹³⁰ This also meant families and prison oversight visitors could not make prison visits. In particular the Office of the Inspecting Judge could not visit prisons. In Malawi, female prisoners were removed to another location, affecting their ability to see family and legal representatives.¹³¹ This is discussed in more detail in the accompanying report on oversight and monitoring.

4. Measures taken to ameliorate the impact of the restrictions

In this section measures taken to ameliorate the impact on fair trial rights are considered. The main attempts related to the use of technology to allow remote ways of achieving the rights. These, however, have limitations and enjoyed little success in the African context, as these methods require software, internet access and electricity, which is not always universally available. Furthermore, it is debateable whether remote consultations and court processes provide the necessary safeguard for people in detention, and there are questions as to the cyber-security of such systems. Nevertheless, the countries under review did attempt remote methods of meeting fair trial rights in the context of restrictions imposed under COVID-19 laws.

¹²⁸ 'Kenyan High Court Rules That Lawyers Are Essential Workers during COVID-19 Lockdown - International Centre for Investigative Reporting' <<https://www.icirnigeria.org/kenyan-high-court-rules-that-lawyers-are-essential-workers-during-covid-19-lockdown/>> [accessed 14 September 2021].

¹²⁹ 'Mozambique: Visits to Mozambican Prisons Suspended', *AllAfrica.Com*, 2020 <<https://allafrica.com/stories/202003270902.html>> [accessed 14 September 2021].

¹³⁰ 'Covid-19: Lockdown Makes Access to Justice for Prisoners Even More Difficult | GroundUp' <<https://www.groundup.org.za/article/covid-19-lockdown-makes-access-justice-prisoners-even-more-difficult/>> [accessed 14 September 2021].

¹³¹ 'Coronavirus Banishes Female Inmates to Far-Flung Jails in Malawi', *Reuters*, 17 August 2020, section Coronavirus: Full Coverage <<https://www.reuters.com/article/us-health-coronavirus-malawi-women-idUSKCN25D1LE>> [accessed 14 September 2021].

4.1. Telephonic consultations with lawyers for detainees

As noted above, in most of the countries under review, there was an initial period where visits by lawyers to places of detention were not permitted. In South Africa, directions issued by the Department of Correctional Services (DCS) under the Disaster Management Act, state that lawyers and inmates may communicate telephonically through the Head of Correctional Centre in urgent matters and “where circumstances and resources permit”.¹³² Heads of Correctional Centres were also required to designate areas within their facilities to allow inmates to consult with their lawyers by telephone. It is unclear the extent to which this occurred successfully and to which detainees were able to consult in private, particularly as many require translators. Even if implemented properly, it would have placed restrictions on attorney-client communications. The necessary privacy may not have been possible.

4.2. Court video-conferencing

In some countries attempts were made to substitute the lack of in-person access to the court via video-conferencing. Although digital proceedings were implemented in Kenya, including some leading to the release of remand detainees,¹³³ these have not adequately compensated for lack of access to courts, and backlogs developed.¹³⁴ In Malawi, the party calling a witness before court may make an application for permission from the court for the witness to give his or her evidence via video link.¹³⁵ It is unclear whether such a link permits all parties, including the accused, to be present. In South Africa, video-remand was used only to postpone matters.¹³⁶ Arguably, postponement by video-remand does not meet the requirements of in-person hearings and the safeguard provided by a detainee appearing physically in court. The safeguard against torture and ill-treatment of regular physical appearances in court is one of the primary underlying reasons that most common-law countries require remand warrants to be renewed regularly (in many jurisdictions every fortnight). Extending remand warrants via video-conferencing does not provide the same degree of protection

¹³²Ronald Ozy Lamola, ‘Directions issued in terms of regulation 10(2)(a) of the Regulations under the Disaster Management Act, 2002’, 2020, 6.

¹³³ Aisha Salaudeen CNN, ‘Kenya Has Freed Nearly 5000 Inmates via Newly Adopted Skype Court Sessions’, CNN <<https://www.cnn.com/2020/04/02/africa/kenya-courts-on-skype/index.html>> [accessed 23 September 2021].

¹³⁴ ‘Kenya Is Struggling to Deliver Justice Online: What Needs to Be Done’ <<https://theconversation.com/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675>> [accessed 14 September 2021].

¹³⁵ ‘ALN Covid Hub - FAQs - Litigation’.

¹³⁶ ‘South Africa: Directions for Court Operations During COVID-19 Lockdown Issued | Library of Congress’.

to an accused person. Indeed, as the various other restrictions on court are likely to extend the duration of this detention.

4.3. Remand detainee releases

Mozambique released pre-trial detainees under its Amnesty Law if charged with crimes punishable by up to one year imprisonment.¹³⁷ In Kenya, the National Council on the Administration of Justice required that judges release all petty and traffic pre-trial detainees on cash bail or free police bond instead of remanding them in custody.¹³⁸

5. Conclusion

Limitations of rights are permitted in certain circumstances. Article 4 of the ICCPR provides that “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

Article 4(2) provides that no derogation from articles 6 (right to life), 7 (prohibition of torture), 8 (paragraphs 1 and 2) (prohibition of slavery and servitude), 11 (prohibition against imprisonment for civil debt), 15 (prohibition of retrospective criminalisation), 16 (recognition as a person) and 18 (freedom of thought, conscience and religion) may be made under this provision.

The killings and torture meted out by police and military in the countries under review in enforcing COVID-19 restrictions clearly constituted unjustifiable limitations of the rights to life and the prohibition of torture. However, fair trial rights were also affected by COVID-19 restrictions. Whether these limitations and the attempts at amelioration rendered the limitations reasonable, justifiable,

¹³⁷ ‘PESSOAS EM LIBERDADE TAMBÉM BENEFICIAM DE AMNISTIA E PERDÃO: Lei da Amnistia extingue cerca de 150.000 processos e beneficia mais de 150.000 criminosos e suspeitos de práticas criminosas - Centro Para Democracia e Desenvolvimento’ <<https://cddmoz.org/pessoas-em-liberdade-tambem-beneficiam-de-amnistia-e-perdao-lei-da-amnistia-extingue-cerca-de-150-000-processos-e-beneficia-mais-de-150-000-criminosos-e-suspeitos-de-praticas-criminosas/>> [accessed 23 September 2021].

¹³⁸ ‘Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>> [accessed 23 September 2021].

and proportional, will only clearly be seen with the passage of time. The safeguard against torture and ill-treatment of regular physical appearances in court cannot simply be dismissed and probably constitute the most serious limitation.

In the African context technological solutions seldom meet their promise in the long-term, and hold a great deal of risk in relation to persons deprived of their liberty.

While measures have been taken to reduce the sentenced prison population, the remand population is likely to have been bolstered by both delays and persons arrested for violations of COVID-19 restrictions, despite some measures taken in some countries to encourage remand releases. Data from other countries is not readily available and tends to reflect the situation before 2020.

What seems notable is that in many of the countries under review, the most restrictive measures were applied in March and April of 2020, when there were relatively few cases of COVID-19 in the countries under review. Furthermore, the measures taken have had long-term impacts in the sense of permanently increased backlogs and delays. Ongoing closures of courts and other limitations are likely to exacerbate the situation.

The impact and performance of oversight and monitoring mechanisms

Lukas Muntingh

1. Introduction

At the core of prison and detention monitoring lie visits by external persons. It is for the simple reason that prisoners, or people in other situations deprived of their liberty, are almost entirely dependent on the administration for their well-being - they are not permitted to leave the prison if one or more of their needs are not met. This imbalance in power makes for a relationship often characterised by tension and distrust, not infrequently spilling over into conflict. Advancing transparency through monitoring and visits by independent persons has the aim to promote compliance with minimum standards and to deal with challenges and problems in a proactive manner. The UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) guarantees regular visits by family members and friends to prisoners as well as largely unrestricted access to legal representatives.¹³⁹ Access to legal representative and being afforded the ability to consult is also confirmed in the International Covenant on Civil and Political Rights (ICCPR)¹⁴⁰ and echoed in African Charter on Human and Peoples' Rights (ACHPR).¹⁴¹ The UNSMR also acknowledges that the deprivation of liberty is 'afflictive' and that it should not be made worse:

Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.¹⁴²

For the purposes here, a distinction can be made between informal and formal monitoring and oversight. With the overall objective being transparency, informal monitoring through visits by

¹³⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), secs 58 and 61.

¹⁴⁰ International Covenant on Civil and Political Rights, sec. 14(3)(b).

¹⁴¹ African Charter on Human and Peoples' Rights, sec. 7.

¹⁴² United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), sec. 3.

families, friends, religious workers and legal representatives all play an important role. Even if these entities do not have a formal mandate to monitor and exercise oversight, they are important in communicating what is happening behind the prison walls. Access to telecommunications is also important for enabling contact with the outside world. It is increasingly the case that landline infrastructure is deteriorating where it exists and being replaced with cellular technology. It is also the case that in most jurisdictions that mobile phones are prohibited in prisons,¹⁴³ citing security reasons. On the formal side, dedicated prison monitoring mechanisms, such as the Judicial Inspectorate for Correctional Services (JICS)¹⁴⁴ in South Africa, the courts and more generally human rights commissions (or National Human Rights Institutions) in the countries surveyed also form an essential part of the criminal justice and human rights landscape. Two of the countries surveyed (Mozambique and South Africa) have ratified the UN Optional Protocol to the Convention against Torture (OPCAT) and designated National Preventive Mechanisms (NPM) as required. Mozambique designated its National Human Rights Commission as the NPM and South Africa designated its Human Rights Commission as the coordinating structure and identified JICS, the Independent Police Investigative Directorate (IPID), Health Ombudsman¹⁴⁵ and the Military Ombudsman¹⁴⁶ as constituent structures of the NPM.

This report looks, from a comparative perspective, at the restrictions placed on formal and informal mechanisms for monitoring prisons and the observations would also apply to other places of detention and questions the long-term suspension of visits to prisoners. It is also evident that states responded differently, even though the threat was the same and the guidance from international bodies (e.g., WHO) applied to all. In many regards the COVID-19 pandemic reaffirmed existing and longstanding problems in African prison systems, but also more broadly the administration of criminal justice. Some 18 months later after the initial response to the pandemic much has changed and much has been learnt, and it is important to take these lessons forward to present a better response in the future to a similar threat and strike a better balance between competing rights.

¹⁴³ See for South Africa: Dept of Correctional Services, B-Order 2- Safety and Security, chap. 13/2.20.

¹⁴⁴ Correctional Services Act, chaps 9–10.

¹⁴⁵ National Health Amendment.

¹⁴⁶ Military Ombud Act.

2. Informal oversight and monitoring

Visits by families and friends to prisoners form an essential lifeline for the overall well-being of many, if not most, prisoners by providing emotional and physical support and being a route of communication to the outside world. Landline telephones are increasingly the exception and the possession of a mobile phone is prohibited for prisoners in most African countries. In-person visits remain in many regards the mainstay of communication between prisoners and their families.

Enjoying the support of a family gives a sense of belonging and often a purpose to work towards or hold on to whilst imprisoned. For many it anchors the future. Especially for those awaiting trial, family support plays a critical role at a time of great uncertainty. Suspending visits by family members would result in heightened anxiety, frustration and isolation amongst prisoners.¹⁴⁷ It is common in African countries that prisoners are highly dependent of family members bringing essential items such as food, medicine, toiletries, bedding and clothing to prison to address the shortages where the state is failing.¹⁴⁸ The suspension of visits by family members due to COVID-19 did result in heightened tensions and in both South Africa and Malawi there was talk of prisoner protests, but these did fortunately not materialise on any significant scale.¹⁴⁹ Visits by family members and friends are in many instances also the only way how information about what is happening inside prison reaches the outside world and, importantly, reaches the ears of human rights defenders, journalists and politicians. Prison systems also have their own rules and permissions applicable to visitors with respect to how often visits are permitted and what they are allowed to bring to the prison. Typically, a security classification system will determine the frequency of permitted visits, phone calls and correspondence.¹⁵⁰ It will also determine what prisoners may receive (e.g., toiletries) or food that they may share with visitors in the course of a visit, or take to their cells and so forth. These are ordinary social human activities that are highly regulated in the prison environment, but do present a powerful tool in the hands of the prison administration to reward good behaviour and punish transgressions of prison rules.¹⁵¹

¹⁴⁷ Langat, Melly, and Nyawira, 'Impact of COVID-19 on Incarcerated Offenders and Community Reintegration Challenges in Kenya Prisons', 57.

¹⁴⁸ Muntingh and Redpath, 'The Socio-Economic Impact of Pre-Trial Detention in Three African Countries'.

¹⁴⁹ 'Riots Erupt in Prisons as Inmates Say They Fear Getting Covid-19'; Mhango, Interview with representative of Centre for Human Rights Education Advice and Assistance (CHREAA).

¹⁵⁰ See for example, the case of South Africa in Muntingh, 'A Guide to the Rights of Inmates as Described in the Correctional Services Act and Regulations', 106–18.

¹⁵¹ Dept of Correctional Services, B-Order 1 - Incarceration Administration, chap. 16.1.2. " The judicious, fair and consistent operation of the amenities programme is an important aid in the hands of the Head of the Prison to regulate the behaviour of prisoners and to ensure a satisfied and orderly prison community. It should

In the five countries surveyed the extent of restrictions on family visits especially for the most part of 2020 ranged from the most severe banning all visits by any external people to prisons (such as in South Africa and Kenya)¹⁵² to restrictions on the number of visitors at a time (e.g., Zambia). In the case of Mozambique, family visits were suspended, but family members could leave parcels for prisoners at prisons, but since mid-August 2021 prisoners can receive a visit from one person per month.¹⁵³ Similarly in Zambia, family members could leave items including cash and raw food. In Malawi, all visits by family members were suspended and this remains the case at the time of writing (Aug 2021), but visits by lawyers and paralegals continued.

Suspending visits by family members may have served, on the one hand, the purpose of reducing the perceived risk at the time of transmitting the virus to the prison population and this would be a valid objective when assessed against a rights limitations analysis.¹⁵⁴ On the other hand, the impact severity of such a limitation needs to be assessed against the duration of the limitation, the mental and physical effects of the limitation on the prison population as well as the personal characteristics of the affected prisoners (e.g. age, sex, health conditions and so forth). A general limitation applicable to all prisoners for a short period of time may pass a limitations test, but the longer in duration the limitation, it would follow the more onerous the obligation becomes on the state to justify such a continued limitation.¹⁵⁵ In essence, it asks if the limitation is proportional to the objective it seeks to achieve.¹⁵⁶ Such a justification needs to take into account, for example, if the prisoner is a child or a mother with children, or a person with mental health concerns and so forth. Mental health is a general concern for prisoners and those returning to society from prison¹⁵⁷ and the impact of long-term suspension of family visits has been identified as an important mental health concern for prisoners in Kenya.¹⁵⁸ A prolonged blanket restriction should ultimately not survive judicial scrutiny. The South African Correctional Services Act, for example, sets an absolute minimum requirement that every prisoner, regardless of their sentence status or any other factor, is entitled to at least one visit per month of an hour in duration.¹⁵⁹ The accompanying Standing Orders do provide that a visit may be exchanged for a

always be borne in mind that maximum strengthening of behaviour is established if the depriving or award of amenities occurs immediately after the offence/ deserving action."

¹⁵² Wanjala, 'Rising Mental Health Cases Forces Kenya To Rethink Ban On Prison Visits'; Annexure B, Section B, paras 16 and 18, Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, Government Gazette, 25 March 2020, No. 43148.

¹⁵³ Decree 56/2021 of 13 August.

¹⁵⁴ See for example rights limitations provisions in the European Convention on Human Rights (ECHR), the Canadian Charter of Rights and Freedoms and the Constitution of South Africa.

¹⁵⁵ *Kalashnikov v Russia* paragraph 114.

¹⁵⁶ *S v Manamela and Another* (Director-General of Justice Intervening); *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae).

¹⁵⁷ Söderholm, 'Prisons and COVID-19: Lessons from an Ongoing Crisis'.

¹⁵⁸ Wanjala, 'Rising Mental Health Cases Forces Kenya To Rethink Ban On Prison Visits'.

¹⁵⁹ Correctional Services Act, sec. 13(3).

telephone call where telephones are available, but the duration of such a phone call is typically substantially shorter than the one-hour visit allowed for in the principal act.¹⁶⁰ The logic behind this is not entirely clear, but may relate to the number of phones available at any one time. The argument can, however, be made that given the exceptional circumstances of a restriction on in-person visits that all efforts ought to be made for other means that prisoners can have contact with their families. In developed countries internet access and email can enable this easily, and the availability of mobile phones in Africa would also have enabled it.

Suspending visits by family members to prisoners also removes an important resource from the hands of prison managers. Under normal circumstances, curtailing visits due to disciplinary infractions is an effective tool to encourage good behaviour, but if all visits are suspended prison managers lose this tool. In the absence of visits, this may result in more problematic behaviour by prisoners. There is some evidence of this from South Africa where the Inspecting Judge for Correctional Services reported a near-doubling in the number of reported cases of use of force by officials in the period April to June 2020 from 123 cases in the preceding quarter to 237 cases.¹⁶¹ In subsequent quarters the number have declined again and this may have been linked to an announcement to release certain categories of sentenced prisoners.¹⁶² A meta-analysis of existing research on the topic found that frequent family visits to prisoners have a positive impact on behaviour of prisoners, reduces rule-breaking and may even reduce the risk of reoffending.¹⁶³

Apart from families visiting prisoners, two other informal mechanisms of monitoring exist. These are non-governmental organisations (NGOs) rendering service to prisoners and legal representatives of prisoners. NGOs typically provide some type of service to prisoners or the prison as institution which may range from health care, religious services, human rights education, education, training and therapeutic services, to name a few. Typically, their focus is not *per se* on monitoring conditions of detention or the treatment of prisoners, but they do receive information from prisoners through their interactions and their staff also observe what is happening in prisons. The presence of external people in a prison promotes transparency and thus serve an important protective and preventive function. Lawyers visiting their clients in prison are in a similar position as they may also receive information

¹⁶⁰ Muntingh, 'A Guide to the Rights of Inmates as Described in the Correctional Services Act and Regulations', 106–18.

¹⁶¹ Judicial Inspectorate for Correctional Services, 'Quarterly Performance Report - April to June 2020', 16; Judicial Inspectorate for Correctional Services, 'Quarterly Performance Report - Jan to Mar 2020', 14; Judicial Inspectorate for Correctional Services, 'Quarterly Performance Report -Jul to Sep 2020', 19; Judicial Inspectorate for Correctional Services, 'Quarterly Performance Report - Jan to Mar 2021', 20.

¹⁶² Press statement, 'Minister Ronald Lamola: Special Coronavirus COVID-19 Parole Dispensation Statement'.

¹⁶³ De Claire and Dixon, 'The Effects of Prison Visits From Family Members on Prisoners' Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research Since 1991'.

and make observations, even if they do not have access to the cell areas of the prison. In Mozambique visits by lawyers continued although visits by family members were suspended. This stands in contrast to South Africa where visits by all external parties were suspended, including lawyers. In the case of lawyers, telephonic consultations were permitted, but subject to urgency and the availability of infrastructure with the permission of the Head of Centre.¹⁶⁴ This type of restriction on access to one's legal representative harks back to the SoE of the 1980s under the apartheid regime.

In summary on informal monitoring and oversight, it can be concluded that a temporary and clearly defined restriction of a relatively short duration would in all likelihood pass a limitations test. Such a restriction would further be made more acceptable through a careful risk assessment identifying specific risks (e.g., contact versus non-contact visits) and implementing ameliorating measures, such as increased access to telephones. In the case of South Africa, there should never have been any restriction on access to legal representatives since telephonic contact and non-contact visits (as is the cases for awaiting trial prisoners where there is a glass screen between the individuals and they communicate via an intercom or handset) pose no risk of transmission. Non-contact visits also enable the physical inspection of the person even if it is from a metre or two away. The blanket suspension of all visits (or even only family visits) may have been an over-reaction in hindsight and better risk - assessment, the implementation of ameliorating measures to enable some form of family contact, and adhering to health protocols in a dynamic manner, should be considered for the future.

3. Formal oversight

In mid-March 2020 WHO issued guidelines on dealing with the COVID-19 pandemic and cautioned as follows:

The COVID-19 outbreak must not be used as a justification for objecting to external inspection of prisons and other places of detention by independent international or national bodies whose mandate is to prevent torture and other cruel, inhuman or degrading treatment or punishment; such bodies include national preventive mechanisms under the Optional Protocol to the Convention against Torture, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Committee for the

¹⁶⁴ Minister of Justice and Correctional Services, Regulations under the Disaster Management Act, 2002, sec. 4.1.

Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹⁶⁵ [references omitted]

Shortly thereafter the UN Sub-Committee on the Prevention of Torture (SPT) issued a public advice emphasising that:

- even if visits are affected, it does not mean it should stop;
- the potential exposure to the risk of ill-treatment faced by those in places of detention may be heightened due to public health measures being taken;
- it must be ensured that effective measures are taken to reduce the risk of detainees suffering ill treatment due to pressures on detention systems.¹⁶⁶

Even though the SPT's focus is on states parties to OPCAT, the issues raised are in line with the general obligations to prevent and eradicate torture and other ill treatment provided for in UNCAT (see in particular Articles 2 and 16) and to which the countries surveyed are all states parties to.

The lockdown measures appear to have had a profound impact on at least three spheres of formal monitoring and oversight in some countries, being the functioning of the courts; the functioning of designated oversight structures (i.e., the NPMs in Mozambique and South Africa), and the functioning of the legislatures as monitoring and oversight structures.

In respect of the **functioning of the courts**, perhaps the most severe restrictions were imposed in South Africa under so-called Levels 5 and 4 (27 March to 31 May 2020) in that courts would only deal with urgent matters and cases related to COVID-19, and all other matters where accused persons are in custody would be remanded in their absence for the period of the lockdown. Importantly, the Chief Justice left it to judicial officers to determine what priorities are, thus opening the door for varied interpretations. Effectively this brought the criminal justice system to a standstill for at least two months, create a backlog and added to the time suspects remained in custody, or at least had a decision made on their cases. In the case of Mozambique, a system was implemented where fewer staff would be on duty at any one time at the courts presumably to make social distancing easier.¹⁶⁷ Unlike South Africa, Mozambique did not implement a system of case prioritisation and the reduction in capacity affected all matters. The reduced capacity remained in force until further notice, which

¹⁶⁵ WHO, 'Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention - Interim Guidance', 5.

¹⁶⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms Relating to the Coronavirus Pandemic', para. 7.

¹⁶⁷ ACJR & REFORMAR, 'Prevenção ao Covid19 nos Tribunais e Estabelecimentos Penitenciários'.

remained the position at the time of writing (Aug 2021). It can be anticipated that the reduced capacity will in time create a backlog. In Zambia, the subordinate courts continued to deal with criminal matters as per usual, but civil matters were affected.¹⁶⁸ Malawian courts implemented a system of rotation whereby different grades of magistrates would be available at different times. Although exact data is not yet available it can be anticipated that this would have resulted in the delayed processing of cases. Data from one province in South Africa (Western Cape) on the number of prisoners in custody indicate firstly, that fewer people were entering the criminal justice system (due most likely to the strict curfew imposed and changed modes of policing), and secondly, this created a delay in the finalisation of cases (prisoners moving from the category of unsentenced to sentenced).¹⁶⁹

Courts are the custodians of the fair trial rights articulated in international law and domestic constitutions.¹⁷⁰ Apart from the fact that a trial must occur in an open court (unless there are exceptional circumstances), the appearance of the accused in open court serves an important protective function since the presiding officer can engage with the accused and make physical observations as to their well-being and state of health, and also enquire as to his or her treatment and conditions of detention. It is also generally within the court's powers to review continued detention and order the conditional or unconditional release of the accused. In short, it means that even if it is not stated explicitly in law as such, courts fulfil a vital monitoring and oversight function over the use and nature of detention, as well as the treatment of those detained. In the case of South Africa, it then appears that these important protective powers of the courts were effectively suspended for at least two months at the stroke of a pen by the Minister responsible through Regulations issued and subsequent directives from the Chief Justice. In the case of Malawi, Mozambique and Zambia it seems this protective function was diluted by reducing the number of officials at court and the capacity to deal with criminal matters.

A number of **designated oversight structures** were identified. As noted already, two of the countries surveyed, Mozambique and South Africa, have ratified OPCAT and designated a National Preventive Mechanism; in both cases the respective human rights commissions. South Africa also has a designated prison oversight structure in the Judicial Inspectorate for Correctional Services (JICS) which is tasked with inspecting and reporting on the treatment of and conditions of detention of prisoners in the custody of the Department of Correctional Services.¹⁷¹ However, JICS was not included in the

¹⁶⁸ Kalunga, 'Executive Disorder, Constitutionalism and COVID-19 in Zambia'.

¹⁶⁹ Muntingh, 'South Africa'.

¹⁷⁰ International Covenant on Civil and Political Rights, secs 9–15; Constitution of the Republic of Kenya, secs 23 and 50; Constitution of the Republic of Malawi, sec. 42; Constitution of the Republic of Mozambique, sec. 59; Constitution of the Republic of South Africa, sec. 35; Constitution of the Republic of Zambia, sec. 18.

¹⁷¹ Correctional Services Act, chaps 9–10.

list of essential services gazetted in March 2020 and effectively then prevented any further monitoring of prisons by JICS until a change was effected some three months later.¹⁷² Other structures under the NPM also failed to implement monitoring activities. Kenya has a police oversight structure in the Independent Policing Oversight Authority (IPOA) which, amongst others, conducts inspections of police premises.¹⁷³ In Malawi, the Inspectorate of Prisons is mandated to monitor and inspect both prisons and police cells, but it is an unfunded mandate and dependent on donor funding, resulting in infrequent activities.¹⁷⁴ Mozambique's National Human Rights Commission was also not able to conduct monitoring visits since it is also, as in the case of Malawi, dependent on donor funding for monitoring visits.¹⁷⁵ The overarching impression is then that even where designated oversight structures exist, these were either actively prevented for doing their work, or a lack of resources had the same result.

It is the norm that Members of Parliament are empowered to visit places of detention but evidence could not be found that MPs stepped in to fill the gap left by the absence of other oversight structures. Resource constraints may also have played a role.

4. Conclusion

From the preceding it is firstly evident that states responded differently to limit the spread of COVID-19 to prisons in as far as visits and oversights were concerned. This ranged from suspending all visits (and even restricting telephonic communication between lawyers and their imprisoned clients), to permitting visits from lawyers and paralegals. Visits by families to prisoners were restricted in all states and remain so to some degree. Given earlier research findings on the level of physical and emotional support that prisoners receive from family members prior to the pandemic, there is little doubt that not only have prisoners suffered an additional burden in the absence of such support, but that family visits as a means of informal oversight and a means of communication, suffered great damage and made prisons less transparent. The extent to which this enabled or permitted rights violations is unknown, but it can be assumed that the developments were regressive as measured against commonly accepted principles for transparent and accountable prison administrations.

¹⁷² Annexure B, Section B, paras 16 and 18, Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, Government Gazette, 25 March 2020, No. 43148.

¹⁷³ Independent Policing Oversight Authority (Kenya), sec. 6.

¹⁷⁴ Constitution of the Republic of Malawi, secs 169–170.

¹⁷⁵ Muntingh, 'Africa, Prisons and COVID-19'.

The overall impression is that the statutory structures established for the very purpose to continue monitoring and oversight did not rise to the occasion. This was a result of either being excluded by law to perform their duties, or being so constrained by resources that they could not perform their functions at a time when it was sorely needed. Articles 19 and 20 of OPCAT set out the powers of the NPM, emphasising the power to regularly examine the treatment and conditions of detention of people deprived of their liberty and access to all places of detention.¹⁷⁶ The Protocol does not place any limitation on the powers of the NPM in this regard and certainly not that access may be denied by means of a ministerial directive, as happened in South Africa. In respect of the powers of the Subcommittee for the Prevention of Torture (SPT), Article 14(2) of OPCAT does provide for the following under exceptional circumstances:

Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Articles 19 and 20 contain no such provision in respect of the NPM as Nowak and McArthur conclude as follows on the issue: "The grounds of public safety or natural disaster, as foreseen in Article 14(2) in relation to a visit of the Subcommittee, could certainly not be invoked as a reason for denying a NPM access to a detention facility."¹⁷⁷ Not including JICS as part of essential services in South Africa was consequently a serious departure from the State's obligation under OPCAT.

The events of the past 18 months have again exposed old weaknesses and shortcomings of prisons in Africa, leaving prisoners vulnerable to a range of rights violations on a systemic scale. This requires a more creative response than just falling back on locking the prison gates and keeping everyone out. A rights-based response requires drawing on technology, practical solutions and also addressing the old shortcomings of collapsing infrastructure and underfunded prison mandates.

* * *

¹⁷⁶ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, secs 19–20.

¹⁷⁷ Nowak and McArthur, *The United Nations Convention Against Torture - A Commentary*, 1091.

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Appendices

Country Survey: Kenya

J Mangwanda with L Muntingh, T Lorizzo, K Petersen and J Redpath

<https://acjr.org.za/acjr-publications/appendix-one-kenya.pdf>

Country Survey: Malawi

J Redpath with L Muntingh, T Lorizzo, K Petersen and J Mangwanda

<https://acjr.org.za/acjr-publications/appendix-two-malawi.pdf>

Country Survey: Mozambique

T Lorizzo & V Petrovic with L Muntingh, J Redpath, K Petersen and J Mangwanda

<https://acjr.org.za/acjr-publications/appendix-three-mozambique.pdf>

Country Survey: South Africa

K Petersen with L Muntingh, T Lorizzo, J Redpath and J Mangwanda

<https://acjr.org.za/acjr-publications/appendix-four-south-africa.pdf>

Country Survey: Zambia

K Petersen & J Mangwanda with L Muntingh, T Lorizzo, and J Redpath

<https://acjr.org.za/acjr-publications/appendix-five-zambia.pdf>